No. 13659

United States
Court of Appeals
For the Ninth Circuit

FARMLAND IRRIGATION COMPANY, INC.,
a corporation,

Appellant,

vs.

GEORGE DOPPLMAIER,

Appellee.

Brief for Appellee

Appeal from the United States District Court for the District of Oregon.

MAGUIRE, SHIELDS, MORRISON AND BAILEY,
ROBERT F. MAGUIRE,
Pittock Block,
Portland, Oregon;

LIPPINCOTT & SMITH,
21 California Street,
San Francisco, California,
Attorneys for Appellee.

HOUGHTON-CARSON COMPANY, PRINTERS

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Brief for Appellee

Appeal from the United States District Court for the District of Oregon.

This is appellee's brief in answer to the brief of appellant, applicant for intervention in an action for the recovery of royalties alleged to be due under a patent license agreement; the United States District Court for the District of Oregon having denied appellant's motion for leave to intervene.

STATEMENT OF THE CASE

The statement of the case by the appellant in its Brief for Appellant, pp. 3, 4, and 5, is adopted by the appellee with the following corrections, additions and restatements of facts:

On December 5, 1947, Darrell C. Mansur, patentee of certain irrigation apparatus, entered into a license agreement with Stout Irrigation, Inc., whereby certain rights to manufacture and sell said apparatus were granted the latter (Transcript of Record, pp. 3, 4, 5). Stout Irrigation, Inc., agreed to pay royalties under said license agreement in the amount of 3% of the sum received from licensed sales (Transcript of Record, p. 4). Plaintiff George Dopplmaier is the assignee and owner of the letters patent issued to Mansur, and by reason of Dopplmaier's ownership as assignee of said patent and the patent rights appertaining thereto, Stout Irrigation, Inc., must pay any royalties that may be due under the license agreement to Dopplmaier (Transcript of Record, pp. 3, 4).

The sequence of events outlined by the appellant leading to its Motion to Intervene will be restated herein for purposes of greater clarity. It is as follows:

1. June 6, 1951—Dopplmaier filed a complaint in the U. S. District Court for the District of Oregon against Stout Irrigation, Inc., for unpaid royalties (Transcript of Record, pp. 3, 4, 5, 34).
2. October 8, 1951—Stout Irrigation, Inc., filed its answer (Transcript of Record, p. 34).
3. February 1, 1952—Affidavit of J. M. Kroyer sets forth that on February 1, 1952, Farm-

Appellant sets forth in its Counterclaim that on or about, to wit, the 31st day of January, 1952, Stout Irrigation, Inc., was dissolved, and all of its assets were distributed to its several stockholders; that thereafter, on or about, to wit, the 1st day of February, 1952, appellant acquired from said stockholders all of the assets of Stout Irrigation, Inc., and entered into a contractual obligation pursuant to which it assumed all of the obligations of Stout Irrigation, Inc., and became the successor to its business (Transcript of Record, pp. 23, 24).

land Irrigation, Inc., by contract acquired all of the assets of Stout Irrigation, Inc., and bound itself contractually to assume all the liabilities of the latter (Transcript of Record, p. 19).

4. May 23, 1952—Farmland Irrigation, Inc., filed a Motion to Intervene, and a Motion to Dismiss (Transcript of Record, p. 35).

The above sequence of events points out that Farmland Irrigation, Inc., appellant herein, had no relationship to Plaintiff George Dopplmaier and Defendant Stout Irrigation, Inc., of any kind until over three and one-half months had elapsed from the date the answer was filed by the Defendant Stout Irrigation, Inc., in the U. S. District Court for the District of Oregon.

An additional fact that appellee presents is that the same attorneys, namely, L. R. Geisler and Theodore H. Lassagne, represent both the Defendant Stout Irrigation, Inc., and Farmland Irrigation, Inc., appellant herein, which seeks to intervene as a Defendant (Transcript of Record, pp. 17, 18, 19, 25, 26, 27, 28, 32, 33).

ARGUMENT

I. Intervention as a matter of right.

The first point urged by the appellant is that it is entitled to intervene *as a matter of right* in the case of *George Dopplmaier, Plaintiff, vs. Stout*

Irrigation, Inc., an Oregon Corporation, Defendant (Brief for appellant, pp. 5, 6). The appellant predicates its alleged right of intervention upon the provisions of Rule 24 (a) of the Federal Rules of Civil Procedure. The appellant asserts the applicability of Rule 24 (a) by contending that the representation of its interest by the existing defendant, Stout Irrigation, Inc., is and will be inadequate, and that it will be bound by a judgment in the action of *George Dopplmaier v. Stout Irrigation, Inc.* (Brief for appellant, pp. 5, 6).

In order to analyze properly the validity of appellant's claim of right to intervene, Rule 24 (a) of the Federal Rules of Civil Procedure will be set forth, together with a discussion of its scope and relevancy to the facts of this case.

Rule 24 (a) states, in pertinent part, the following:

> "Upon timely application anyone shall be permitted to intervene in an action: * * * (2) When the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; * * *"

Essential to an absolute right of intervention in accordance with Rule 24 (a) is a showing by the applicant for intervention that *both the conditions* stated by the Rule, namely, inadequate representation by existing parties *and* a judgment that is or

may be binding in the action, exist. A showing that an applicant for intervention will be bound by a judgment in the action is not in itself sufficent to confer upon such applicant a right to intervene; it must also be shown that representation of the applicant for intervention's interest by existing parties is or may be inadequate.

> *MacDonald v. United States,* 119 Fed. (2d) 821, 827 (C.A. 9; 1941);
>
> *Tachna v. Insuranshares Corporation of Delaware, et al.,* 25 Fed. Supp. 541, 542 (District Court 1; 1938).

It is clear that representation of the appellant's interest by the existing party, Stout Irrigation, Inc., is adequate. Argument will now be directed to this point.

In support of its argument that it will be bound by a judgment in the action of *George Dopplmaier vs. Stout Irrigation, Inc.,* the appellant states the following (Brief for appellant, p. 7):

> "A judgment against a defendant who has a right of action to recover over against a third party is conclusive upon the latter provided he has notice and a full opportunity to defend. This is true whether the right of action arises by operation of law or, as here, by express contract.
>
> *Washington Gaslight Co. v. District of Columbia,* 161 U.S. 316, 329; 165 S. Ct. 564; 40 L. Ed. 712."

Accordingly, if appellant is to be bound by a judgment in the action, it will be so bound only by reason of notice and full opportunity to defend. Since the appellant, without becoming a formal party to the record, would have a full opportunity to present all of its defenses by reason of notice and an opportunity to defend the action, it inevitably follows that representation of the appellant's interest by the existing party will be adequate. Hence there would be no right to intervene under Rule 24 (a). This principle is well stated in *Washington Gaslight Co. v. District of Columbia, supra,* to the following effect:

> "In *Boston v. Worthington,* 10 Gray, 496, 498, 499, the language of the court in *Littleton v. Richardson,* 34 N.H. 187, 66 Am. Dec. 759, was quoted and adopted:
>
> " 'When a person is responsible over to another, either by operation of law or by express contract, and he is duly notified of the pendency of the suit, and requested to take upon him the defense of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, *and has the same means and advantages of controverting the claim as if he were the real and nominal party upon the record.* In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not.'
>
> * * *

> "The foregoing rulings are supported by many decided cases. * * *" (Emphasis ours.)

On the other hand, if appellant were not given notice and a full opportunity to defend, it would not be bound by a judgment in the action, and would have no right to intervene under Rule 24 (a). Thus the position of the appellant must be either that it has had notice and a full opportunity to defend, in which case it has no right to intervene since it may present all of its defenses and accordingly its interest will be adequately represented by the existing party; or that it has not received notice and a full opportunity to defend, in which case it has no right to intervene since it will not be bound by a judgment in the action.

Additionally, none of the criteria which establish inadequacy of representation is present in the case at bar. In *Kind et al. v. Markham,* 7 F.R.D. 265, 266 (District Court 2; 1945), the Court approved the following criteria for determining the adequacy of representation of an applicant for intervention's interest by existing parties:

> "In Moore's Federal Practice, §24.07, at page 2333, it is stated that 'Inadequacy of representation is shown if there is proof of collusion between the representative and an opposing party, if the representative has or represents some interest adverse to that of petitioner, or fails because of nonfeasance in his duty of representation.' The cases seem to support this."

Applying these criteria, the Court disallowed intervention by remaindermen of a trust in a suit brought by the trustees against the Alien Property Custodian for a return of stock to the trust. In rebuffing the contention that the representation of the remaindermen by the trustees might be inadequate, the Court stated the following:

> "There is no charge here of fraud or collusion. The interests of the plaintiffs and the applicants are identical; and the plaintiffs are the mother and brother of the applicants. In fact, the plaintiffs have filed an affidavit herein urging the granting of the motion."

In the case at bar, there is clearly no inadequacy of representation based upon the above standards. There is no charge of fraud or collusion. The identity of interest of the appellant and its representative, Stout Irrigation, Inc., is strikingly manifested by the fact that the attorneys who represent Stout Irrigation, Inc., namely, Theodore H. Lassagne, and L. R. Geisler, are also the attorneys for the appellant (Transcript of Record, pp. 17, 18, 19, 25, 26, 27, 28, 30, 32, 33). Since the same attorneys represent both Stout Irrigation, Inc., and the appellant, and since both Stout Irrigation, Inc., and the appellant set forth identical Answers (Transcript of Record, pp. 15, 16, 17, 20, 21, 22), it is clear that the same defense will be presented whether or not the appellant is a formal party to the record. In the face of these

facts it is a certainty that appellant's interest is adequately represented, since appellant's attorneys are conducting the defense of Stout Irrigation, Inc., and are defending on the same grounds as set forth by the appellant in its Answer.

Concerning the impact of a common attorney for both the party to the record and an applicant for intervention on the right to intervene, *McAvoy v. United States,* 178 Fed. (2d) 353 (C.A. 4; 1949), held that among the reasons for a bankrutcy court denying leave to apply for intervention by the United States in a pending Federal District Court suit was the fact that the interest of the United States was represented by its Justice Department acting as attorney for a party to the record in said pending suit.

Certainly a charge of non-feasance on the part of Stout Irrigation, Inc., is not and cannot be made by the appellant. In fact the Docket Entries (Transcript of Record, pp. 34, 35, 36) reveal that the attorneys for Stout Irrigation, Inc., and the appellant have diligently pursued the defense of the action on behalf of Stout Irrigation, Inc. Thus inadequacy of representation is not established in terms of the criteria set forth in *Kind et al. v. Markham, supra.*

In summary, representation of appellant's interest by the existing party, Stout Irrigation, Inc., is adequate and hence appellant cannot intervene under Rule 24 (a) for the following reasons: (a)

The appellant, in order to be bound by a judgment in the action, as it alleges it will be, must have received notice and a full opportunity to present all its defenses; (b) There is no collusion between Stout Irrigation, Inc., and George Dopplmaier; (c) The identity of interest between the appellant and Stout Irrigation, Inc., and the fact that the appellant will have his defenses presented are additionally established by the presence of appellant's attorneys in the action as the attorneys of Stout Irrigation, Inc.; (d) The Docket Entries reveal that Stout Irrigation, Inc., has vigorously defended the action instituted against it by George Dopplmaier.

II. Applicant for intervention as an indispensable party, and termination of federal jurisdiction.

The appellant urges in its second point that jurisdiction of the Court would not survive the alleged right to intervene, because the purported intervenor is an indispensable party and a citizen of the same state as the plaintiff, and jurisdiction is dependent upon diversity of citizenship.

Since the argument of appellee presented in I negatives the right of appellant to intervene, it is submitted that a consideration of appellant's second point is unnecessary to a disposition of this case. However, the appellee will now direct argument to the contention that appellant is an indispensable party.

Rule 19 (a), Federal Rules of Civil Procedure, states the following with respect to necessary joinder of parties:

> "(a) Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff."

Whether or not a party must be joined as an indispensable party in accordance with Rule 19 (a) is determined by reference to state law. This principle is succinctly stated in *County of Platte v. New Amsterdam Casualty Co.*, 6 F.R.D. 475 (District Court 8; 1944) as follows at page 482:

> "Subdivision (a) of Rule 19 deals with the necessary joinder of indispensable parties and is declaratory of the law as it previously existed with respect to who are indispensable parties. Under such previously existing law, the indispensability of parties depended upon state law.
> * * *
>
> "The Court will therefore look to the law of Nebraska in determining whether W. L. Boettcher, or his representatives, are necessary or indispensable parties to the instant actions."

The cases of *Young v. Garrett*, 149 Fed. (2d) 223, 228 (C.A. 8; 1945) and *Kroese v. General Steel Cast-*

ings Corporation et al., 179 Fed. (2d) 760, 761, 762 (C.A. 3; 1950) are to the same effect.

Under Oregon law, it is clear that the appellant could be sued by the plaintiff as a third party creditor beneficiary by reason of the agreement to assume the liabilities of Stout Irrigation, Inc. (Brief for appellant, pp. 3, 4).

Umpqua Valley Bank v. Wilson, 120 Or. 396;

Erickson v. Grande Ronde Lumber Co., 162 Or. 556, 568.

Erickson v. Grande, supra, at page 586, further establishes as Oregon law the principle that a creditor beneficiary can elect to sue either the original debtor or the party who has assumed the original debtor's obligation:

> "From Restatement of the Law, Contracts, § 141, we quote:
>
> " '(1) A creditor beneficiary who has an enforceable claim against the promisee can get judgment against either the promisee or the promisor or against each of them on their respective duties to him. Satisfaction in whole or in part of either of these duties, or of judgment thereon, satisfies to that extent the other duty or judgment.'
>
> "The principle embraced in the Restatement represents the law of this state."

Since, as the excerpt from *Erickson v. Grande, supra,* holds, a promisor who has assumed the obligation of the promisee and who is in privity of contract with said promisee need not be made a party in a suit by the creditor against the promisee, certainly much less could it be argued that an assuming promisor be made a party defendant, where, as is true in this case, the promisor, appellant herein, has not entered into a contract with defendant Stout Irrigation, Inc., of any kind whatsoever, but rather for its own reasons has chosen affirmatively not to enter into privity of contract with said Stout Irrigation, Inc.

Thus a creditor beneficiary is not compelled to join the original debtor and the party who has assumed the liability in the same action, but rather can proceed to judgment against either one. Accordingly, when suit is instituted against the original debtor, as in the case at bar, the party who assumed the liability, namely, the appellant, is not in Oregon an indispensable party. Hence appellant need not be joined as an indispensable party under Rule 19 (a).

The following cases further assert the proposition that parties as to whom joinder is not required by state law are not indispensable in a federal action: (1) In *County of Platte v. New Amsterdam Casualty Co., supra,* it was held that the principal obligor was not indispensable in a suit against the sureties on a bond inasmuch as the obligation of the principal and sureties was joint and several and state law allowed a suit against the surety alone; (2) In *Greenleaf v. Safeway Trails,* 140 Fed. (2d) 889 (C.A. 2; 1944), a joint obligor was held not indispensable in a suit brought against the other obligor, particularly in view of the New York statutes which permitted a joint obligor to be sued separately; (3) In *Young v. Garrett, supra,* certain tenants in common were held not indispensable parties in a suit by one tenant in common for recovery of land and damages thereto in view of a state court decision allowing a tenant in common to sue individually.

The appellee submits that the above argument is decisive in resolving the issue of indispensability against the appellant. However, the appellee will now consider the four criteria used in determining party indispensability alluded to by the appellant (Brief for appellant, p. 9) as set forth in *State of Washington v. United States,* 87 Fed. (2d) 421, 427, with reference to their applicability to the case at bar:

> "(1) Is the interest of the absent party distinct and severable?"

The controversy in the action of *George Dopplmaier vs. Stout Irrigation, Inc.,* relates to royalties allegedly due to Dopplmaier from Stout as a result of an agreement entered into between these two parties (Brief for Appellant, p. 3). The appellant had no part in said agreement. Accordingly, whether or not an obligation is due and owing to Dopplmaier from Stout must be determined solely between Dopplmaier and Stout and without reference to appellant in any manner. It therefore follows that the interest of appellant is distinct and severable from the controversy.

> "(2) In the absence of such party, can the court render justice between the parties before it?"

Since the appellant is in no way relevant to a determination of whether royalties are due to

Dopplmaier from Stout, it is clear that a fair adjudication of the controversy between the parties can in no manner be affected by his absence.

> "(3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party?"

In the case of *Samuel Goldwyn, Inc., v. United Artists Corporation,* 113 Fed. (2) 703 (C.A. 3; 1940), "interest" is defined as follows at page 707:

> "We conclude that the 'interest' referred to both in Rule 19 and the decided cases is one which must be directly affected legally by the adjudication."

If the appellant has received no notice or opportunity to defend the action, any decree made therein will not injuriously affect any interest it may have since the decree will not bind the appellant, *Washington Gaslight Co. v. District of Columbia, supra,* and consequently the appellant's interest could not be directly affected legally by the adjudication. If the appellant has received notice and an opportunity to defend the action, it cannot be regarded as an absent party, though not a formal party to the record, since it has the same means and advantages of controverting the claim and presenting its dedefenses as if it were a formal party to the record.

> *Washington Gaslight Co. v. District of Columbia, supra.*

A decree made under such facts would not be made in the absence of appellant.

> "(4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?"

From the discussion of (1), (2), and (3), it is apparent that a final determination in the absence of the appellant as a formal party to the record will be consistent with equity and good conscience.

Relative to a termination of federal jurisdiction, it is uncontroverted that the appellant, not being an indispensable party, could in no manner cause such termination, but that jurisdiction would continue to exist.

> *Wichita Railroad & Light Company v. Public Utilities Commission of The State of Kansas,* 260 U.S. 48, 54;
>
> *Kentucky Natural Gas Corporation v. Duggins,* 165 Fed. (2d) 1011, 1015 (C.A. 6; 1948).

Additionally, the facts reveal that the Complaint in the action of *George Dopplmaier v. Stout Irrigation, Inc.,* was filed June 6, 1951 (Transcript of Record, p. 34); the Answer in said suit was filed October 8, 1951 (Transcript of Record, p. 34); and on February 1, 1952, the appellant bound itself contractually to assume the liabilities of Stout Irrigation, Inc., as consideration for its assets (Transcript

of Record, pp. 19, 20). It therefore follows that the appellant assumed the liabilities of Stout after the complaint and answer in the action had been filed, and after federal jurisdiction based on diversity of citizenship had been fully acquired by the Court. The issue is therefore presented as to whether federal jurisdiction can be defeated by an event which occurs subsequent to the vesting of jurisdiction and which is occasioned by a voluntary act.

The answer is clear that under circumstances such as these federal jurisdiction continues to exist. In *Cohen v. Maryland Casualty Co.*, 4 Fed. (2d) 564 (District Court 4; 1925), the principal is stated as follows at page 567:

> "The general rule is that, when the jurisdiction of the federal court has once attached, it is not subject to be divested by subsequent events, or extraneous matters."

In *Hardenbergh v. Ray,* 151 U.S. 112, an ejectment action was instituted in the federal court by a citizen of New York against tenants in possession of the land, all citizens of Oregon, federal jurisdiction being based on diversity of citizenship. The landlords, on their own motion, were substituted as parties in place of the tenants. One landlord was a citizen of New York. The contention was made that federal jurisdiction terminated because of lack of diversity of citizenship. The court overruled the contention stating the following at page 118:

> "This objection is without merit * * * when the original suit was brought against * * * the persons in possession, the court acquired jurisdiction of the controversy, and no subsequent change of the parties could affect that jurisdiction."

The case of *Porto Rico v. Ramos,* 232 U.S. 627, holds to the same effect.

In the case of *Jarboe v. Templer,* 38 Fed. 213, the court held that in a suit on a claim by a citizen of Missouri against a citizen of Kansas, in which federal jurisdiction based on diversity of citizenship existed, a purchase of the claim by a citizen of Kansas and his presence as a party would not destroy federal jurisdiction. *Sternberger v. Continental Mines, Power & Reduction Co.,* 259 Fed. 293 (Colorado; 1919) held that on a sale of the property in controversy in a pending suit to a citizen of the same state as the opposite party, federal jurisdiction based on diversity of citizenship remained though the buyer was made a party to the suit. The contention was advanced in the Sternberger case that where a subsequent party of the same citizenship as the opposite party is created by operation of law, jurisdiction continues after substitution; but where such a subsequent party exists by reason of a voluntary act of a party, jurisdiction is lost. The court rejected this specific contention and found that jurisdiction continued. *Glover v. Shepperd,* 21 Fed. 481, holds the same effect.

It is thus the law that the appellant, assuming Stout Irrigation, Inc.'s, liabilities after federal jurisdiction attached, could not under any view defeat jurisdiction based upon diversity of citizenship.

CONCLUSION

It is submitted to be unequivocally clear that appellant has no right to intervene under Rule 24 (a), Federal Rules of Civil Procedure; that appellant is not an indispensable party; and that appellant could in no manner terminate federal jurisdiction by defeating diversity of citizenship.

The Order of the District Court denying the motion to intervene should be affirmed.

Respectfully submitted,

MAGUIRE, SHIELDS, MORRISON & BAILEY,

ROBERT F. MAGUIRE,

LIPPINCOTT & SMITH,

Attorneys for Appellee.